90-1821

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMCO, (JOHNSON ARCHITECTURAL METAL COMPANY),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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May 1991

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QUESTION PRESENTED

1. Should a reviewing court defer to the phantom credibility choices of an administrative fact finder when questions of law control?

LIST OF INTERESTED PARTIES

The following were parties to the proceeding in the Eleventh Circuit Court of Appeals:

National Labor Relations Board, (Respondent) (hereinafter "Board" or "NLRB") and Johnson Architectural and Metal Company (Petitioner) (hereinafter "JAMCO" or "Employer").*

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* Petitioner JAMCO has no parent or subsidiary.

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OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals sought to be reviewed in this case is reported without opinion at 927 F.2d 614 and is reproduced in its entirety at p. 1a in the Appendix to this Petition. The Decision of the National Labor Relations Board and the findings of the Administrative Law Judge Hutton S. Brandon (hereinafter the "ALJ") are published at 294 N.L.R.B. 80 and are reproduced in their entirety beginning at p. 2a in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Eleventh Circuit Court of Appeals was entered on February 22, 1991. This Petition has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. Amend. V.

> No person shall be ... deprived of life, liberty or property, without due process of law.

29 U.S.C. § 158(a)(1)

> It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

29 U.S.C § 158(a)(3)

> It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. § 160(f)

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . [t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF CASE

JAMCO is a construction contractor specializing in architectural metal, caulking and glazing. In August of 1987, JAMCO was actively engaged in three large construction jobs in the Atlanta area: the Concourse 5 project, the Lenox Hotel project and the IBM Tower project. By early September 1987, the IBM Tower project was nearing completion and work had been phased down substantially. The Lenox Hotel job was virtually shut down as a result of a contractual dispute between the general contractor and the owner. In response to JAMCO's reduced workload in the Atlanta area, JAMCO determined in late August to lay off five (5) employees.

In late summer of 1987, as JAMCO's Atlanta projects were phasing down, the Glaziers Architectural, Metal and Glassworkers Local Union 1940 (hereinafter "Union") began an organizational campaign among JAMCO's employees. On August 5, 1987, the Union filed with the Board a petition for a union election, which was granted. On October 14, 1987, the Union lost the election by a vote of 39 employees against and 13 in favor of representation, with 7 challenged ballots. The Union objected to the election, alleging that JAMCO discriminatorily laid off four (4) employees and had unlawfully threatened to close its operations, all of which unfairly influenced the election results.

The Union complained that the four (4) layoffs were discriminatory in that they allegedly targeted union sympathizers. The Board found that the layoffs were economically necessary and that the individuals were selected for layoff strictly on the basis of seniority. However, the Board concluded that the layoffs were

discriminatory in that they were motivated by anti-union sentiment. The Board's holding that the layoffs were motivated by anti-union animus arises out of an unfounded conclusion that JAMCO changed its layoff policy and because of remarks about the Union allegedly made by a JAMCO supervisor as he distributed the layoff notices.

JAMCO had conducted only one previous layoff. In that layoff, JAMCO employees had been employed at different work sites and had varying levels of skill and experience. For these reasons, JAMCO considered an employee's ability to perform the work in addition to seniority when selecting which employees would be laid off. (Appendix at 41a.) In this situation, however, the pool of JAMCO employees subject to layoff all had equivalent levels of skill and experience to perform the work. Therefore, JAMCO identified employees for this layoff solely on the objective basis of seniority with the company. (Appendix at 36a.)

JAMCO used its computer base to generate a company-wide seniority list to determine which five (5) employees had been with the company for the least amount of time. (Appendix at 35a.) Because one of the five (5) employees quit prior to the layoff, JAMCO only laid off the remaining four (4) identified. The Board found that JAMCO's method of selection was prompted by anti-union animus because JAMCO changed its layoff policy. (Appendix at 42a.)

The Board also based its finding of anti-union animus on conciliatory remarks allegedly made by a JAMCO supervisor, Ray Maynard, while distributing the layoff notices. Allegedly, Maynard remarked that the laid off

employees might be rehired after "this Union business was over." (Appendix at 36a.) The ALJ determined that this remark was significant evidence that the layoff selections were motivated by anti-union animus because neither Maynard nor the other JAMCO supervisor, Randy Dennis, present with him when the layoff notices were distributed, denied that the remarks were made. (Appendix at 39a.) In fact, both Maynard and Dennis did deny making these remarks. (Appendix at 53a-56a.)

The Union further complained that JAMCO unlawfully influenced election results by threatening that JAMCO would close, move, or change its name if the employees elected Union representation. This allegation arose from comments by Dave Edell, a JAMCO Project Manager, during an informational meeting with JAMCO employees at which Edell commented on the closing of a unionized competitor. The Board's finding of unlawful threats is based solely on the contradicted testimony of a single JAMCO employee, James Fletcher. The ALJ stated that he credited Fletcher's testimony because the ALJ found no specific denials that Edell made the alleged threats. (Appendix at 27a.) The record reveals, however, that several witnesses denied that Edell ever made the unlawful statements (Appendix at 57a-60a.), and Fletcher on cross examination admitted that the only closing Edell mentioned was that of Pittsburgh Plate Glass (hereinafter "PPG"), a unionized competitor. The Board acknowledged the evident contradiction but proceeded to uphold the ALJ's unfounded credibility choice. (Appendix at 2a-3a; *Note 2.*)

Administrative Law Judge Hutton S. Brandon conducted a hearing on the complaint on February 10 and 11,

1988. On April 4, 1988, the ALJ issued his decision that JAMCO had committed unfair labor practices in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (hereinafter the "Act"), and recommended a second election. (Appendix at 49a.)

Adopting the recommended order of the ALJ with some modifications, on June 12, 1989 the Board issued its Decision, Order and Direction of Election, ordering JAMCO to cease and desist from violations of the Act and to take specified affirmative actions, and ordering the election results to be set aside and a second election to be conducted. (Appendix at 2a-8a.)

On April 23, 1990, the Board filed with the Eleventh Circuit Court of Appeals an application for enforcement of its June 12, 1989 order. JAMCO filed an answer to the enforcement action denying that it had violated the Act or had committed any unfair labor practice and requesting that the application be dismissed. On February 22, 1991, the Eleventh Circuit Court of Appeals issued a per curiam decision which read, in its entirety, "A review of the record reflects sufficient evidence to uphold and enforce the order of the Board. Questions of credibility are peculiarly within the purview of the fact finder. Enforced." (Appendix at 1a.) On March 14, 1991, JAMCO filed a suggestion for Rehearing En Banc. The Eleventh Circuit denied the suggestion on April 26, 1991.

JAMCO has filed this Petition For a Writ for Certiorari on the grounds that it committed no unfair labor practices in connection with the layoffs or with Edell's remarks.

EXISTENCE OF JURISDICTION

The Eleventh Circuit Court of Appeals had jurisdiction over this matter pursuant to 29 U.S.C § 160(e).

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

A fundamental tenant of our nation's constitution and of the statutory administrative and appellate procedures of the Act is the ability of a citizen to receive a due process hearing and obtain a reasoned decision which is subject to meaningful appellate review. U.S. Const. Amend. V; 29 U.S.C. § 160(f). This fundamental concept is being eroded by the now common practice of administrative agencies and their administrative law judges to couch their opinions on credibility issues instead of the legal issues involved, thus essentially "appeal-proofing" their decisions. This is precisely what happened in this case.

The Board based its opinion in this case on credibility when, in fact, the controlling issues were questions of law. First, it is a question of law whether the Employer had a right to conduct an economically necessitated layoff on the objective basis of seniority during the pendency of a Union election. The ALJ and the NLRB found that the layoff was economically warranted and that the decision to implement a layoff was not unlawful. However, the ALJ and the Board transformed a legal issue of the right of the Employer to layoff on seniority into an irrelevant "credibility" issue of Union witnesses.

Second, it is a question of law as to whether the NLRB's decision could be founded on the ALJ's erro-

neous finding that the Employer made no specific denials of a Union witness' testimony that, on an isolated occasion, the Employer threatened it would close its doors if the Union was selected. In fact, this alleged threat had been vigorously denied by two witnesses for the Employer and contradicted by the "credible" Union witness' own testimony on cross-examination. Despite his erroneous finding that the alleged threat had not been denied, the Board upheld the ALJ's decision solely on the basis of his determination regarding the credibility of one Union witness. The Board cannot legally base its decision on a finding by the ALJ regarding "credibility" when the ALJ expressly based his decision solely upon the erroneous fundamental legal question of whether the Employer had contested the statement.

The Eleventh Circuit Court of Appeals summarily upheld the Board's decision in a two-sentence per curiam decision which expressly stated that the appellate court was deferring to the fact finder's credibility determinations. (Appendix at 1a.)

Our system of checks and balances will deteriorate if administrative agencies are permitted to continue disguising questions of law as "credibility" issues in order to avoid meaningful scrutiny by appellate courts who often "rubber stamp" the credibility determinations of administrative agencies. It is submitted that this in an appropriate case to grant certiorari to so that the United States Supreme Court may revisit the scope of judicial review of administrative decisions in light of this practice which abuses due process and evades judicial scrutiny.

DISCUSSION

A. THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS AND THE NATIONAL LABOR RELATIONS ACT'S MANDATE OF JUDICIAL REVIEW SHOULD PROTECT AGAINST ARBITRARY ADMINISTRATIVE DECISIONS WHICH IGNORE CONTROLLING LEGAL QUESTIONS AND ARE INTENTIONALLY DECIDED ON "CREDIBILITY" ISSUES OF FACT IN ORDER TO EVADE APPELLATE REVIEW.

The issue before this Court is not the credibility of witnesses but the substantive and fundamental due process affording parties in agency litigation the right to have legal issues decided upon the law. By couching its unfair labor practice findings in the guise of "credibility," the Board has effectively insulated a legally insufficient decision from the scrutiny of the appellate court.

The standard of judicial review under the Act is whether there is substantial evidence in light of the record taken as a whole to support the Board's findings of fact. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); 29 U.S.C. § 160(f). In determining whether substantial evidence supports an agency's findings, reviewing courts exhibit great deference to the credibility choices of an administrative law judge. *Ona Corporation v. NLRB*, 729 F.2d 713 (11th Cir. 1984). This is what happened in the case at hand. The Board deferred to the credibility determinations of the ALJ as did the Eleventh Circuit Court of Appeals. In fact, The Eleventh Circuit's per curiam opinion simply stated: "A review of the record reflects sufficient evidence to uphold and enforce the order of the

Board. Questions of credibility are peculiarly within the purview of the fact finder. Enforced." (Appendix at 1a.)

This case illustrates the trend in proceedings before the Board, whereby legal issues are not squarely decided at the administrative level because the agency cloaks its findings with "credibility" choices knowing that an appellate court is not likely to probe the sufficiency of the evidence supporting such determinations. The legal merits of the dispute become buried beneath the phantom credibility choices of the Board.

Although certain deference may be afforded to the Board, "Congress did not intend that [this Court should] abdicate [its] judicial function and merely rubber stamp the Board's rulings." *NLRB v. Deauville Hotel*, 751 F.2d 1562 (11th Cir. 1985). To do so robs an employer of its due process right of judicial review and puts the power of a court in the hands of an administrative agency, in violation of the Act; see *NLRB v. Arkansas Grain Corp.*, 392 F.2d 161 (8th Cir. 1968). A reviewing Court has an obligation under the Act to ensure that the Board's finding has substantial evidentiary support. Substantial evidence means such evidence as would lead a reasonable mind to accept the Board's conclusions. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Enforcement of the Board's order in this case will have the pernicious effect of denying substantive due process of law in favor of deference to the credibility determinations of the administrative trier of fact that obscured the controlling questions of law.

B. DURING A UNION ELECTION CAMPAIGN AN EMPLOYER MAY LEGALLY LAYOFF EMPLOYEES IN RESPONSE TO ECONOMIC NECESSITY ON THE OBJECTIVE BASIS OF SENIORITY.

The Board erred as a matter of law when it failed to reverse the ALJ's finding that four (4) layoffs conducted by JAMCO prior to the election were discriminatory and thus unlawful. A layoff only violates the Act if it is motivated by anti-union animus. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965). In this case the Board found that the layoff was motivated by economic necessity and was not unlawful. During the period preceding the layoffs, JAMCO worked on three large projects in the Atlanta, Georgia area. Most of these projects were beginning to phase down at the time the organizing election began. The ALJ had no trouble in determining that the layoffs at issue were prompted by economic considerations. (Appendix at 38a-39a.) Therefore, the layoffs only violate the Act if JAMCO selected the employees for layoff on the basis of the employees' pro-union sentiments.

The Board acknowledges that JAMCO based its selection of whom to layoff strictly on seniority. (Appendix at 38a, 41a.) The Board's position is that the layoff violated the Act because JAMCO had based a previous layoff selection on two factors, ability to perform the work and seniority. (Appendix at 41a.) The selection of employees to be laid off in the present case was not a change in policy by the Employer. All employees had the ability to perform the work and had, in fact, been performing the work. Therefore, the Employer was following past practice when it laid off the four (4) employees solely on the objective basis of seniority. The ALJ and the Board

erroneously concluded that laying off on the basis of seniority was a change in policy and evidenced JAMCO's anti-union animus. (Appendix at 41a.)

The ALJ seized upon Union witness statements that they were selected for layoff because of their relationship to the Union. These statements were vigorously denied by the Employer's managers who were alleged to have made them. *See infra* p. 13. However, this credibility issue is not controlling. What is controlling was that the Employer did follow its past practice of laying off according to seniority when all employees were deemed qualified to do the required work. The Union supporters selected for layoff were the least senior employees. It is a settled question of law that pro-union sentiments cannot protect an employee from economic layoff. See *Serv-Air, Inc. v. NLRB*, 395 F.2d 557 (10th Cir. 1968), *cert. denied*, 393 U.S. 840 (1968).

Absent a change in policy evidently motivated by anti-union animus, an employer may legally select employees for layoff on the basis of strict seniority. *Jones Ceiling, Inc.*, 263 N.L.R.B. 469 (1982). JAMCO was legally entitled to conduct a layoff because of the economic necessity created by the phase down of its operations in late summer of 1987. An economic layoff will justify the discharge of employees, including union members, even if the employer has knowledge of the employee's protected union activity. For example, in *Dawson Carbide Industries, Inc. v. NLRB*, 782 F.2d 64 (6th Cir. 1986), the Board found that the employer's economic decline justified a layoff. Similarly, in *NLRB v. Atlanta Coca-Cola Bottling Company*, 293 F.2d 300 (5th Cir. 1961), the Fifth Circuit Court of Appeals took judicial notice of the fact that dur-

ing the time period in question, the United States had suffered from a recession. Considering the record as a whole, including the employer's testimony regarding declining sales, the Court held that the layoff was lawfully motivated by economic reasons. *See also Triangle Sheetmetal Works, Inc.*, 238 N.L.R.B. 517 (1978) (Board reversed administrative law judge and found no discriminatory discharge in light of employer's overall economic decline and objective selection of employees for layoff).

In this case, the Employer's anti-union animus is "proved" by conciliatory remarks allegedly made by JAMCO supervisors while distributing the layoff notices. Purportedly, a JAMCO supervisor told one of the laid off employees that he might be rehired "once this Union business was over." (Appendix at 36a.) The ALJ erroneously found that this remark was never rejected by said supervisor. (Appendix at 38a-39a.) In fact, the supervisor expressly stated, "I have never said anything about Union activities as far as they [the laid off employees] go." (Appendix at 54a.) Further, a second JAMCO supervisor present at the time the employees were laid off, confirmed that no comments regarding Union activities were made at the time of the layoff. (Appendix at 55a-57a.) These alleged comments were the issue seized upon by the ALJ to support his decision based on "credibility." In fact, this credibility issue of anti-union animus toward the laid off employees is immaterial to the controlling legal issue that the Employer was entitled to conduct an economic layoff on the basis of seniority and that these employees were automatically selected for layoff because of their lack of seniority. The Board is obviously using credibility choices

in an effort to sustain its holding when its holding is not warranted by law. By deferring to such unsupported credibility choices, the standard of appellate review is being reduced from "substantial" evidence to "any credibility" evidence.

C. THE BOARD CANNOT UPHOLD AN ALJ'S FINDING OF AN EMPLOYER'S THREAT TO CLOSE ITS DOORS BASED ON "CREDIBILITY" WHEN THE ALJ RELIED ON AN ERRONEOUS CONCLUSION TO MAKE HIS FINDING.

During the time of the organizational campaign, a JAMCO supervisor made a statement at a meeting with some employees referring to the recent closing of a local unionized competitor, PPG. Many of the employees present had previously worked for or competed against PPG and were curious about the closing. (Appendix at 57a.) The ALJ found that this statement was evidence of an unlawful threat that JAMCO would close its doors if its workers unionized. The ALJ expressly based this finding on the fact that there had been no specific denial that the manager made the alleged threats.

> On the other hand, however, I find no specific denials by [JAMCO]'s witnesses on the record of Fletcher's testimony to the effect that if the Union were selected [JAMCO] would close, move, or change its name. (Appendix at 39a.)

To the contrary, the record as a whole before the ALJ clearly shows that several witnesses denied that the Employer's manager made unlawful statements (Appendix at 57a-60a.), and that the only closing he mentioned was that of the unionized competitor.

The Board acknowledged this glaring error; yet, it failed to reverse or modify the ALJ's finding; rather it upheld the ALJ's findings based upon alleged "credibility" choices.

> We adopt the [ALJ]'s finding that Project Manager Edell violated the Act by telling the employees that [JAMCO] would close, move, or change its name if the employees selected the Union. In adopting, however, we find it unnecessary to rely upon the [ALJ]'s statement that there were no specific denials by [JAMCO]'s witnesses of employee Fletcher's testimony on the point. *Instead, we base our finding that Edell actually made such a statement on the [ALJ]'s specifically crediting Fletcher's "believable testimony"* and his reliance on Edell's admitted references to the closing of PPG, another union contractor. (Appendix at 2a, 3a; *Note* 2.) (emphasis added).

Here the basis for the ALJ's decision is a lapse in the ALJ's memory or mistake as there were numerous denials that the allegedly unlawful statements were made. A reviewing court should legally and properly disregard credibility choices where the record as a whole shows that they were based on an erroneous assumption as in this case.

Furthermore, the record shows that Fletcher contradicted his own testimony on cross-examination, acknowledging that Edell's remarks that "they" would "close the doors" referred to the unionized competitor, not JAMCO. (Appendix at 60a-61a.) Thus, by ignoring the ALJ's error, the Board transformed the self-contradicted

testimony of one Union witness into evidence sufficient to sustain the Board's finding of an unfair labor practice by JAMCO. (Appendix at 2a, 3a; *Note* 2.) Reviewing courts have an obligation to look beyond such insufficient credibility determinations.

> [T]he Fifth Circuit has delineated certain situations in which the Court will not be bound by the ALJ's credibility determinations. [citations omitted] First, the ALJ's credibility finding will be disregarded if it is inherently unreasonable or self-contradictory. [citations omitted] Second, the reviewing court is "not compelled to restrict" credibility choices "based on an inadequate reason, or no reason at all." [citation omitted]

Ona Corporation v. NLRB, 729 F.2d 713, 719 (11th Cir. 1984) (holding ALJ's credibility determination was self-contradictory and unsupported by the evidence). Similarly, in *Custom Recovery, Division of Keystone Resources v. NLRB*, 597 F.2d 1041, (5th Cir. 1979) the court held:

> Although this court generally gives great deference to the credibility resolutions of the finder of fact, *see NLRB v. Transway, Inc.*, 410 F.2d 368, 370 (5th Cir. 1969), when the theory of credibility is faulty, then the credibility resolution itself must fall. *Id.* at 1045.

In *Custom*, the court held that the administrative law judge credited one witness' version of the alleged unlawful interrogation more than that of another witness due to a mistakenly perceived inconsistency in

the second witness' testimony. Because there actually was no contradiction in the second witness' testimony, the court held that the judge and the Board were wrong in discrediting the testimony and that the finding of unlawful interrogation was not supported by substantial evidence in the record as a whole. *See also NLRB v. Florida Citrus Canners Cooperative*, 311 F.2d 541 (5th Cir. 1963) (petition for enforcement denied where basis for credibility finding was erroneous and finding of unfair labor strike not supported by substantial evidence in the record).

The Board's finding that JAMCO illegally threatened that it would close, move or change its name is based solely on a legally insufficient "credibility choice" by the ALJ. Careful review of the record as a whole reveals that the Board's credibility choice is legally unwarranted.

D. A REVIEWING COURT SHOULD REVIEW AN ADMINISTRATIVE AGENCY'S DECISION AND REVERSE PHANTOM CREDIBILITY FINDINGS THAT ARE NOT BASED UPON SUBSTANTIAL EVIDENCE IN THE RECORD AND WHERE QUESTIONS OF LAW CONTROL.

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), this Court held that any evidence in the record which detracts from a decision of an administrative agency *must* be taken into account by the reviewing court.

> [A] reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting a decision is substantial, when viewed in the light that the record and its entirety furnishes, includ-

ing the body of evidence opposed to the Board's review. *Id.*, at 488.

Universal Camera was decided in response to a legislative mandate that courts must scrutinize more carefully the reasonableness and fairness of the Board's decisions. In that opinion, this Court recognized that reviewing courts should permit themselves to respond to what they perceive as the requirements of justice under the circumstances presented rather than allow themselves to be imprisoned by formulas such as blind deference to credibility determinations. Thus, while an agency's decisions may be given a presumption of regularity, the reviewing court is required to give the agency's action "a thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

A reviewing court should not allow the Board to sweep away significant controlling legal arguments as graphically demonstrated by this case. The legal issue of the Employer's right to select employees for an economically-necessitated layoff based upon their seniority should control, not the phantom credibility issue of statements by Union sympathizers who were selected for layoff due to their lack of seniority. Further, the Board is not free to ignore legally erroneous findings by the ALJ that various statements were not denied, when in fact they were. The Board cannot legally put its imprimatur on the ALJ's credibility findings when his decision was based upon an erroneous foundation.

The disguising of legal issues as credibility issues must receive more judicial scrutiny than the simple per curiam opinion issued by the Court of Appeals in this case, that "Questions of credibility are particularly within

the purview of the fact-finder." (Appendix at 1a.) It is submitted that, in this case, the questions of credibility should be within the purview of a reviewing court. It is time that the United States Supreme Court revisit the issue of how courts should go about their review of agency decisions in light of the now common practice of couching controlling legal questions as phantom credibility issues, a practice which is becoming the darling of the administrative law judges and their agencies.

CONCLUSION

JAMCO respectfully requests that this Court grant Petitioner's Writ for Certiorari because substantial questions of law arise where arbitrary administrative decisions are insulated from judicial review under the cloak of "credibility choices" by the trier of fact.

Respectfully Submitted,
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8377

NLRB Nos. 10-CA-22910, 10-RC-13540

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

versus

JAMCO (JOHNSON
ARCHITECTURAL METAL COMPANY),

Respondent.

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(February 22, 1991)

Before FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.

PER CURIAM:

A review of the record reflects sufficient evidence to uphold and enforce the order of the Board. Questions of credibility are peculiarly within the purview of the fact finder.

Enforced.

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* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JAMCO (JOHNSON
ARCHITECTURAL METAL COMPANY)

Cases 10-CA-22910
and 10-RC-13540

GLAZIERS, ARCHITECTURAL, METAL &
GLASS WORKERS LOCAL UNION 1940

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION (June 12, 1989)

On April 4, 1988, Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions as

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[1] The General Counsel and the Charging Party did not except to the judge's various dismissals of certain complaint allegations.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

modified and to adopt the recommended Order as modified.

Amended Conclusions of Law

We adopt the judge's finding that Project Manager Edell violated the Act by telling the employees that the Respondent would close, move, or change its name if the employees selected the Union. In adopting, however, we find it unnecessary to rely on the judge's statement (at sec. 11,B,4, par. 9) that there were no specific denials by the Respondent's witnesses of employee Fletcher's testimony on the point. Instead, we base our finding that Edell actually made such a statement on the judge's specifically crediting Fletcher's "believable testimony" and his reliance on Edell's admitted references to the closing of PPG, another union contractor. Further, in light of the clear threat of loss of jobs involved in Edell's unlawful statement, we find it unnecessary to pass on the judge's further finding that Edell also unlawfully threatened employees with the loss of jobs by telling them that the election of the Union would result in fewer jobs for the Respondent's employees because metal frame work would be assigned to the ironworkers.

In addition to finding an unlawful threat of plant closure, Member Cracraft would affirm the judge's finding that the Respondent's statement that the ironworkers would be brought in to handle the metal frames and the Respondent's employees who were then doing metal frames would go to the bench in the event the Union won the election was an unlawful threat of job loss in violation of Sec. 8(a)(1).

Given the judge's crediting on demeanor grounds of employees Kerr and Harris over Supervisors Maynard and Dennis, we further find it unnecessary to rely on the judge's statement at sec, II, C, 2, par. 2 that Maynard and Dennis failed to contradict Kerr's testimony that Maynard had said that their recall from layoff would probably be after "this Union business" was over.

In adopting the judge's findings on unlawful interrogation, Member Cracraft does not rely on *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

1. Substitute the following for Conclusion of Law 3.

"3. By coercively interrogating an employee regarding his union membership or activities; and by threatening to close, move, or change its name if its employees selected the Union to represent them, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act."

2. Substitute the following for Conclusion of Law 6.

"6. The Union's Objections 1 and 7 have merit and are sustained, while Objections 3, 6, and 9 are without merit and are overruled and Objection 8 need not be passed on."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, JAMCO (Johnson Architectural Metal Company), Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their membership or activities on behalf of Glaziers, Architectural, Metal & Glass Workers Local Union 1940, or any other labor organization.

(b) Threatening its employees that it will close its facility, move, or change its name if they select the above-named or any other labor organization to represent them.

(c) Discriminatorily selecting employees for layoff or otherwise discriminating against employees in order to

discourage their activities on behalf of the above-named or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris immediate and full reinstatement to jobs occupied by them prior to any discrimination against them or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole with interest for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Post at its facility in Atlanta, Georgia, and all jobsites where it is currently doing business and employing employees in the unit described in Case 10-RC-13540,

copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the Union's Objections I and 7 are sustained, that Objections 3, 6, and 9 are overruled, that the election conducted on October 14, 1987, is set aside, and that Case 10-RC-13540 is severed from Case 10-CA-22910 and remanded to the Regional Director for Region 10 to conduct a new election when the Regional Director deems it appropriate.

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Glaziers, Architectural, Metal & Glass Workers Local Union 1940.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394

U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C.

June 12, 1989

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees regarding their membership in, or activities on behalf of, Glaziers, Architectural, Metal & Glass Workers Local Union 1940, or any other labor organization.

WE WILL NOT threaten to close, move, or change our name if employees select the above-named or any other labor organization to represent them.

WE WILL NOT discriminatorily select our employees for layoff or otherwise discriminate against them because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris immediate and full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole with interest for any loss of pay they suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the discharges of Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

JAMCO (JOHNSON ARCHITECTURAL METAL COMPANY)

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Street, NW., Suite 2400, Atlanta, Georgia 30323-2400, Telephone 404-331-2886.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE
(April 4, 1988)

JAMCO (JOHNSON ARCHITECTURAL METAL COMPANY)

and CASE 10-CA-22910

GLAZIERS, ARCHITECTURAL, METAL & GLASS WORKERS LOCAL UNION 1940

JAMCO (JOHNSON ARCHITECTURAL METAL COMPANY)

Employer

and CASE 10-RC-13540

GLAZIERS, ARCHITECTURAL, METAL & GLASS WORKERS LOCAL UNION 1940

Petitioner

Gaye Nell Hymon, Esq., for the General Counsel.

Paul L. Styles, Jr., Esq., (Blackburn, Schuster, King & King), of Atlanta, GA for the Charging Party-Petitioner.

McNeill Stokes and John Underwood, Esqs., (Stokes, Shapiro, and Wedge) of Atlanta, GA, for the Respondent-Employer.

DECISION

Statement of the Case

HUTTON S. BRANDON, Administrative Law Judge. This matter was tried at Atlanta, Georgia on 10 and 11

February 1988. The charge was filed by Glaziers, Architectural, Metal & Glass Workers Local Union 1940, herein called the Union, on 5 October 1987,[1] and amended 30 October and 4 November. The complaint issued on 23 November alleging that Jamco (Johnson Architectural Metal Company), herein called Respondent or the Company, violated Section 8(a)(3) and (1) of the National Labor Relations Act, herein called the Act. The issues presented are whether Respondent, (a) unlawfully interrogated employees regarding their union activities, (b) made various unlawful threats to employees to discourage their union support, (c) made unlawful promises to employees regarding wage increases and insurance benefits to dissuade them from supporting the Union, and (d) discriminatorily discharged four employees on 4 September because of their activities on behalf of the Union and other concerted activities.

The record shows relative to representation case Case 10-RC-13540 that the petition was filed by the Union on 5 August. Following a representation case hearing on 21 August, a Decision and Direction of Election issued on 15 September and an election was held on 14 October. Of approximately 59 eligible voters there were 13 votes for, and 39 against, representation with 7 challenged ballots. The Union timely filed nine numbered objections to the election on 26 October, and as noted, the Regional Director found the objections were largely coextensive with the allegations in the complaint in Case 10-CA-22910, and, in an Order Directing Hearing and Consolidating Cases, issued on 4 December, ordered that the representation case

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[1] All dates hereafter are in 1987 unless otherwise indicated.

be consolidated with the unfair labor practice case for hearing.[2]

On the entire record including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, and Respondent, and the oral argument of the Charging Party made at the hearing. I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a Georgia corporation with an office and place of business in Atlanta, Georgia where it is engaged in the erection of curtain walls, stone work, caulking and glazing. During the calendar year preceding issuance of the complaint Respondent purchased and received at its Atlanta, Georgia jobsites, materials and supplies valued in excess of $50,000 directly from suppliers located outside the State of Georgia. The complaint alleges, Respondent's answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The complaint also alleges, Respondent also admits, and I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Background*

Respondent, at the times material herein, was engaged in the building and construction industry installing

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[2] The withdrawal of Objections 2, 4, and 5 by the Union was approved in the Order Directing Hearing.

and glazing metal framed curtain walls, with construction jobs in the Atlanta, Georgia metropolitan area as well as in Florida, Tennessee, and North Carolina. The Atlanta jobs including the IBM Tower, Corporex, Concourse 5, and Lenox hotel, are large multi-storied commercial structures. In Florida Respondent was engaged in work at the North Carolina National Bank building in Tampa. Different work crews were employed at each of these locations with each location or job headed by a job superintendent. Hiring of employees was customarily done at each project, but Respondent had in the past maintained a corp of skilled employees which it transfered between projects as old jobs were completed and new ones begun.

Respondent's employees historically had been unrepresented, and the record reveals no prior attempts by employees at union representation. The record also fails to reveal precisely when the Union organizational campaign involved in this case began, but it implies that it began with Respondent's employment of Johnnie Lambert. Lambert testified herein for the General Counsel that he was hired by Respondent on 24 July, apparently at the IBM Tower jobsite and worked for one week during which time Lambert obtained signatures on union authorization cards from an unspecified number of employees. Lambert was discharged by Respondent about 31 July, and although his discharge was alleged to be discriminatory by the Union in the initial and first amended charge herein, no such allegation is contained in the last amended charge or the complaint allegations. The discharges which were alleged in the complaint to be discriminatory and which were litigated are discussed below

following discussion of the alleged independent violations of Section 8(a)(1) of the Act.

B. *The Alleged Independent Violations of Section 8(a)(1) of the Act.*

1. **The Conduct of Ray Maynard**

At all material times Ray Maynard was employed by Respondent as its job superintendent on the Concourse 5 site in North Atlanta. The complaint alleges that on 5 August Maynard interrogated employees concerning their Union membership, activities and desires. Roman Modest, an alleged discriminatee in this case, testified in support of this allegation that he sought a job from Maynard on 4 August at the Concourse 5 jobsite. Modest was briefly interviewed by Maynard, and as the two were headed toward Maynard's truck, an unidentified air conditioning worker commented to Maynard that he should hire Modest, that Modest was a good worker. Maynard then asked Modest if he were affiliated with a union, and Modest responded that he was trying to get on with the Union but that they were not taking any new members. Modest in fact was a member of the Union and had been since 1984. Following his hiring Modest participated in the Union's organizational effort and testified at the hearing in the representation case on 21 August.

The General Counsel and Charging Party argue that Maynard's questioning Modest about his Union affiliation was unlawful. Maynard, while a witness, did not deny the question Modest attributed to him. Accordingly, and because Modest's testimony was clear, straightforward, and specific, I credit such testimony and find Maynard asked the question claimed by Modest. Not all ques-

tioning of an employee regarding unions by a supervisor is unlawful. See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984). Maynard's question was not accompanied in this instance by any remark remotely suggesting any opposition to the Union. Indeed, while not giving an entirely truthful response to Maynard, Modest was not deterred from at least indicating his union sympathy by telling Maynard that he had tried to get into the Union. Moreover, Modest testified that he completed his application for employment with Respondent by voluntarily indicating thereon which prior jobs he had worked on were union or nonunion. Finally, Modest was obviously hired notwithstanding his revelation of an effort to join the Union. Under these circumstances, I view Maynard's question was casual and innocuous, and more related to, if anything, ascertaining Modest's experience than to his potential as a union organizer or supporter. I find Maynard's question under the circumstances had no tendency to coerce, and I find Respondent did not violate Section 8(a)(1) of the Act by such question.

The complaint also alleges that Maynard on or about 1 October threatened employees on the Concourse 5 jobsite that it would be futile for the employees to select the Union as their collective bargaining representative by saying Respondent would not "go Union" under any circumstances. No evidence was adduced on this allegation, however, and it will be recommended that this complaint allegation be dismissed.

2. Conduct Attributed to Tony Faulkner

Tony Faulkner was employed by Respondent as its job superintendent on the IBM Tower. The complaint

alleges that Faulkner interrogated an employee regarding his Union membership on the IBM jobsite on or about 29 July. Proof of the allegation rests on the testimony of Lambert who related that after he had been working on the job a couple of days, having been employed 24 July, Faulkner approached him and asked him if he was Union. Lambert replied that he belonged to the Operating Engineers. Faulkner then further inquired why Lambert was not working out of the union hall and Lambert replied that he didn't want to. Lambert expressed uncertainty about Faulkner's further response. While it appeared clear that Faulkner said Respondent was "not union," Lambert was unsure whether Faulkner added that Respondent wasn't "going union" or whether he said Respondent "didn't want a Union."

Faulkner in testifying for Respondent admitted that he asked Lambert questions about whether "he was carrying any kind of book or a card or anything for a reference on how long he had been a member of a union or anything as far as experience-wise." He further admitted that Lambert replied he carried an Operator's card, and that Faulkner had asked why he wasn't operating equipment rather then glazing. Faulkner claimed that his questions were made in the context of trying to establish the extent of Lambert's glazing experience, since Lambert had demonstrated by his work that he was not an experienced glazier. In this regard, Faulkner testified that he had asked Lambert, at the same time, the names of any companies for which Lambert had previously preformed glazing work.

Weighing the testimony of Lambert against that of Faulkner I credit the former. Lambert impressed me as

candid while Faulkner at times appeared evasive. Moreover, I note that Faulkner did not specifically deny Lambert's testimony to the effect that Faulkner said Respondent was "not Union." That added remark was inconsistent with an innocent question about union membership as an indicator of past experience. Further, the timing of Faulkner's questions, coming as they did only a few days after Lambert had been hired, are more in keeping with an effort to ascertain union proclivity or activity than to determine the extent of Lambert's experience. In light of this, and considering Faulkner's further concession that sometime during Lambert's brief one week of employment with Respondent Faulkner learned he was a union organizer, I conclude that it was more probable that Faulkner's questions were not innocuous. I find it more likely they were designed to discover or verify Lambert's Union proclivities. Considered in context with Faulkner's notation to Lambert that Respondent was not union I find Faulkner's questions tended to restrain or coerce employees in violation of Section 8(a)(1), as alleged. An employee questioned under the circumstances found would not likely overlook the implication that union support would engender Respondent's displeasure with all its ramifications.

The complaint also alleges that Faulkner on or about 12 October threatened employees at the Concourse 5 jobsite that Respondent would close its plant if employees joined the Union or engaged in union activities. No evidence was adduced in support of this allegation. Accordingly, dismissal of this complaint allegation will be recommended.

3. The Unlawful Conduct Attributed to Albert Bell

a. *The Supervisory Status of Bell*

Albert Bell at the material times herein was employed by Respondent at its NCNB jobsite in Tampa, Florida. The complaint alleged, and Respondent denied, that Bell was a supervisor, and that on or about 1 October he unlawfully promised Respondent's Tampa employees increased benefits if they refrained from union activities. Respondent contends that Bell was only a leadman and an eligible employee as found in the Regional Director's Decision and Direction of Election in Case 10-RC-13540. Respondent at the hearing asserted that the General Counsel is precluded from taking a position inconsistent with the Regional Director's decision by claiming herein that Bell is a supervisor within the meaning of the Act. I find no merit to Respondent's contention. It is well settled that a representation case finding that an individual is not a supervisor is not binding in a subsequent unfair labor practice proceeding involving as here, a violation of Section 8(a)(1) of the Act, as opposed to an 8(a)(5) allegation which would be deemed to be "related" to the representation case findings and any resulting certification. See *Williamson Memorial Hospital*, 284 NLRB No. 5, (29 May 1987); *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978); *Greenbriar Hotel*, 216 NLRB 721, 723 (1975). However, the Regional Director's decision and the record in the representation case, of which I have taken administrative notice, have been considered by me in addition to the evidence presented before me in the unfair labor practice proceeding in determining Bell's supervisory status.

Bell, in his testimony before me, described himself as the foreman on the Tampa job, having been employed by Respondent for about five years. While Bell denied that he did any hiring and firing, he conceded that under the direction of A. J. Hege, job superintendent, Bell scheduled work and kept the work time of employees in a notebook. Any disputes about the accuracy of the time kept was resolved between Bell and the employee involved. He further conceded, and other record evidence supports the fact, that he granted time off to employees without going through Hege. Although, as noted, he did not directly hire or fire employees, Bell made recommendations to Hege regarding such actions, and he estimated that Hege followed his recommendations on hiring 75 percent of the time. However, Bell related that Hege "screens" the hirings.

Bell testified he attends periodic meetings, usually bimonthly, between the job superintendent, Hege, and project manager Dave Edell. Further, in the absence of Hege, Bell as representative of Respondent, attends meetings between the job's general contractor and subcontractors. An estimate in the record by employees James Fletcher that Bell only worked with tools along with the employees only 20 percent of the time was not specifically contradicted by Bell. Moreover, Bell admitted that Respondent had about four other "foremen" over a total of about 20 employees who "reported" to Bell as "head foreman," and that he with the other foremen distributed the work load to the employees.

Section 2(11) of the Act defines a supervisor as "any individual having authority to layoff, recall, promote, discharge, assign, reward, or discipline other employees,

or responsibly to direct them, or to adjust their grievances or to effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine and clerical nature, but requires the use of independent judgment." Possession of one of these enumerated powers is sufficient to establish supervisory status. *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 355 U.S. 908 (1949). I find Bell to be a supervisor. The evidence herein specific to Bell as opposed to leadmen generally whether or not also called "foremen," fully establishes that Bell kept the time by which employees were paid. Further, he adjusted any grievances on the accuracy of the time independently of the job superintendent. Moreover, Bell even disciplined employees by docking them a specified amount of time for tardiness which he determined. It is further clear that Bell independently assigned work, and substituted for the project superintendent in his absence even in meetings with the general contractor. In this respect, the record fully establishes that degree of discretion in control of employees which warrants the finding of Bell's supervisory status.

b. *The Conduct of Bell*

The General Counsel's contention that Bell made unlawful promises is based upon the testimony of Tampa employees Rudolph Guthrie and James Fletcher. According to Guthrie, around the first of October Bell approached him and Fletcher who were working together on the job and told the two that he realized that they were doing "frustrating work," and that "We're not promising you," and "We're not trying to buy your vote or anything like that," but that "We're going to see what we can do

about getting you more money." Fletcher generally corroborated Guthrie's testimony, but added that Bell had previously told the employees that raises would be frozen until "this," an apparent reference to the Union campaign, was all over with. Bell, further according to Fletcher told him and Guthrie that they weren't supposed to give any raises, but "were going to try to see what we can do for you guys."

Bell did not address, and thus did not deny, the remarks regarding raises attributed to him by Guthrie and Fletcher. Thus, Guthrie and Fletcher are credited on this point. There was no evidence, however, that they were actually granted a wage increase prior to the election or even after the election. The promise of benefits by an employer during an election campaign may constitute a subtle but nevertheless unlawful inducement if its purpose is to impinge of the employees freedom of choice in selecting union representation. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). Based an Guthrie's testimony Bell made a point of stressing that he was not promising either man he would be successful in attempting to secure a raise for them. The timing of Bell's remark obviously implies the promise of a raise based on union considerations notwithstanding his assertion that no promise was being made. On the other hand, and considering Respondent's prior announcement that wages would be frozen during the union campaign there is no other evidence suggesting that Bell's statements were intended to be more than an effort to encourage employees who, by Fletcher's testimony, Bell recognized were carrying more than their share of the work. Further, Bell did not condition his efforts toward a wage increase

for the two on the outcome of the election or their support of the Union if in fact they did so support it. Under all these circumstances, I find it difficult to conclude that Bell's remarks constituted a promise of benefits to discourage union support despite his specific averments to the two employees to the contrary. Accordingly, I find Bell's remarks did not constitute a promise of benefits to discourage union support in violation of Section 8(a)(1) of the Act as alleged.

4. The Statements Attributed to Dave Edell

The complaint as amended at the hearing, alleged that Dave Edell, project manager for Respondent, for the Tampa job, on or about 9 October, at the Tampa jobsite, threatened employees it would be futile for them to select the Union since Respondent would not sit down and negotiate with the Union, that employees would lose jobs if they engaged in Union activities, and that Respondent would close if employees joined or engaged in Union activities. Again the General Counsel relied upon the testimony of Guthrie and Fletcher to prove the allegations. Their testimony, discussed below, is mutually corroborative in some, but not all, respects.

According to Guthrie's testimony, Edell spoke to assembled Tampa employees a week before the election and told employees that Respondent did not want to "go union," and that they were not going to go union. Edell added that if the employees wanted to go Union, fine, they could do so, but that Respondent would not sit down and negotiate. Further, Edell stated that all the Union wanted was their jobs working with the metal frames and explained that the Iron Workers Union would be brought in to handle the metal frames, that the Iron Workers

members sitting on the bench would "come in," and the Respondent's employees who were then doing the metal frame work would go on "the bench."

Unlike Guthrie, Fletcher did not attribute any remark to Edell in the meeting to the effect that Respondent would not sit down and negotiate with the Union. Indeed, on cross-examination Fletcher testified he didn't hear Edell say that Respondent would not bargain or "anything like that". However, he did relate that Edell said it was Respondent's policy not to be union and that Respondent would "either close the doors or we will move to another location, or we will change our name." Moreover, Edell added that the Iron Workers would do all the metal work, and that Respondent "probably won't need half of you guys, because all you guys would be doing is setting glass." Edell concluded saying, "The Union doesn't need any more men," and "The Union wants your jobs."

According to Fletcher, Edell referred to Pittsburgh Plate Glass Company (PPG), observed that it was the "only signed" union contractor in Atlanta, remarked "You all know what PPGs fixing to do," and said "They're fixing to sell out or close the doors."[3] While not entirely clear from Fletcher's testimony it appears he believed the reference to PPG was made in the context of Edell's claim that the Union only wanted the jobs of Respondent's employees.

Edell, who was conceded by Respondent to be its agent although not a supervisor within the meaning of

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[3] Fletcher conceded that it was already common knowledge among employees that PPG was "fixing to either close the doors or go out of business."

the Act, testified that he did in fact have a meeting with the Tampa employees, but placed it on Monday, 12 October. According to Edell, the meeting was intended to be a question and answer session, and he conceded that he made remarks regarding the closing of PPG and about the Iron Workers. Regarding the former he testified it was discussed because it was a matter of interest to Respondent's employees, but he was initially vague with respect to how the subject was raised and the extent of his remarks on the matter. With respect to the Iron Workers, Edell failed to relate exactly what he told the employees, but he testified herein that it was his understanding that in the curtain wall business work was split between the Iron Workers and the Glaziers, with Iron Workers assuming work responsibility for anything involving metal [frames] and that Glaziers has responsibility for glazing. Edell was not specifically asked, and thus did not specifically deny, the statement attributed to him by Guthrie to the effect that Respondent would not negotiate with the Union.

Bell testified that he attended the meeting at which Edell spoke. He denied that Edell said that Respondent would not negotiate with the Union. Although he verified the discussion regarding PPG at the meeting his recollection of the context was that since PPG was closing Respondent would be "filling the void." Bell, a former business agent of a local Glaziers Union in Tampa, also confirmed that Edell referred to the Iron Workers and testified that Edell said that the Iron Workers, who do the metal work, "would probably do most of the work, if there was an election."

Job superintendent Hege also testified regarding the meeting of 12 October and generally supported Bell's version of the remarks regarding PPG made at the meeting. He likewise testified that to his knowledge nothing was said to the effect Respondent would not negotiate with the Union. On cross-examination Hege admitted that Edell had said that in a jurisdictional dispute the Iron Workers could "take work away from them."

Although many other employees were identified as attending the 12 October meeting, no party herein sought to have them testify regarding Edell's remarks and assist the trier of fact in resolving the credibility conflicts outlined in the testimony set forth above. These conflicts must be resolved upon the basis of the record as it presently stands, considered as a whole, as well as upon the demeanor of the witnesses. Initially, it is to be observed that Guthrie and Fletcher were employees of Respondent at the time of the hearing, and therefore were giving testimony adverse to their employer which could serve to put their jobs at risk. These circumstances serve to enhance their credibility. See *Georgia Rug Mill*, 131 NLRB 1304, 1305 at fn. 2 (1961). Considering this, and because both in demeanor gave the appearance of attempting to testify honestly and accurately, I would be inclined to credit them where their testimony is mutually corroborative or uncontradicted. However, each attributed remarks to Edell not heard by the other with Guthrie stating Edell said Respondent would not sit down and negotiate with the Union and Fletcher saying that Edell said Respondent would close and move if the Union was elected. Since Fletcher did not support Guthrie on the issue, and also because I find persuasive Bell's emphatic

denial that Edell said Respondent would not negotiate with the Union, I find Edell did not make the remark claimed by Guthrie. Accordingly, I find no threat not to negotiate as such, and no violation of Section 8(a)(1) in this respect.

On the other hand, however, I find no specific denials by Respondent's witnesses on the record of Fletcher's testimony to the effect that if the Union were selected Respondent would close, move, or change its name. Accordingly, Fletcher's believable testimony, enhanced by Edell's admitted references to the closing of PPG, another Union contractor, is credited. On Fletcher's credited testimony, I find that Edell did by his remarks threaten that Respondent's operation would be closed in the event of Union organization in violation of Section 8(a)(1) of the Act.

All the witnesses agree that Edell alluded to the Iron Workers and indicated that the election of the Union would result in a loss of jobs to Respondent's employees by virtue of assignment of the metal frame work to the Iron Workers. There was no evidence presented that such a consequence would legally follow the Union's election. Respondent contends, in effect, that the remarks of Edell regarding the Iron Workers were an expression of opinion of the possibility of jurisdictional disputes arising between the Iron Workers and Glaziers Unions. Hege and Bell both testified that historically there have been disputes between the two unions regarding the metal work associated with glazing of the type done by Respondent, and that such disputes were common knowledge in the industry. As further evidence of such disputes Respondent in its brief cited a number of Board decisions in Sec-

tion 8(b)(4)(D) cases involving jurisdictional disputes between these two unions necessitating Board resolution of the disputes under Section 10(k) of the Act.

I find Edell's remarks constituted more than an expression of opinion that jurisdictional disputes might be encountered if the Glaziers [sic] were elected. Rather, I view his remarks as a direct threat of loss of jobs for his own testimony implies that he viewed the splitting of the work between the two unions with Iron Workers getting the metal work in curtain wall construction as an inevitable consequence of the Glaziers' [sic] election. His remarks therefore lead employees to believe that a loss of jobs would follow selection of the Glaziers. There was clearly no showing that such a loss would be based upon a jurisdictional agreement between the two unions. Nor was there any explanation that any division of the work would have to follow Respondent's voluntary assignment of the metal work to the Iron Workers or that it be awarded by the Board to Iron Workers following a 10(k) hearing and after the Board had found reasonable cause to believe there had been a violation of Section 8(b)(4)(D) of the Act. Obviously, awards flowing from a 10(k) hearing are not predictable, since the Board must weigh many factors in making an award including the employer's prior assignment of the work. Such factors vary from case to case. Accordingly, there are too many imponderables left unexplained to the employees, and of which they could not otherwise be expected to be aware, which would preclude them from fairly understanding or evaluating Edell's remarks as other than a direct threat, particularly when considered in the context of the threat of closure found to have been made by Edell in the same

"discussion." Cf. *Gino Moreno Enterprises*, 287 NLRB No. 145 (29 Feb 1988); *Eagle Comptronics, Inc.*, 263 NLRB 515 (1982).

Respondent argues further that even if Edell's remarks on jurisdictional disputes constitute a misrepresentation of law it is not an objectionable or unlawful misrepresentation, citing *Tri-Cast. Inc.*, 274 NLRB 377 (1985). In *Tri-Cast* the Board held that it would not overturn election results based on an employer's misrepresentation of employee rights. Because I have found Edell's remarks were a direct unlawful threat of loss of work rather than a simple misrepresentation I conclude *Tri-Cast* is inopposite.

Edell's reference to the Iron Worker's under all the above noted circumstances where the Glaziers were seeking exclusive representation of the unit employees clearly threatened the loss of jobs by employees flowing from selection of the Union. I therefore find Edell's remarks constituted the threat of job loss alleged in the complaint, and I find such remarks violated Section 8(a)(1) of the Act as alleged.

5. The Alleged Promises of Dependent Insurance Coverage

The complaint alleged that Respondent on or about 1 September at both its IBM jobsite in Atlanta and at its Tampa jobsite through job superintendents Leroy Faulkner and A. J. Hege, promised employees dependent insurance coverage if they refrained from joining, or engaging in activities on behalf of the Union. Evidence regarding such a promise by Leroy Faulkner was never adduced. However, it is clear from the testimony of Douglas

Davis, Respondent's comptroller, that Respondent on 12 August did grant employees the option for dependent insurance coverage with Respondent paying one-half the cost of such coverage. The announcement of this option was made to all employees on 12 August one week following the filing of the petition in the representation case. However, Davis testified that George Johnson, Sr., Respondent's President, decided that Respondent would offer its employees dependent insurance coverage, and directed Davis in early June to solicit quotes from several insurance firms for employee dependent coverage. Davis did so completing the process in late July. At that time, according to Davis, it was determined that none of the quotes received were better than that offered by the insurance carrier Respondent was then using. The offer of dependent coverage was not immediately implemented, and, as a result of the filing of the representation case petition Respondent found it necessary to check with its counsel concerning implementation. As noted, Respondent announced the dependent coverage offer to all employees at all jobsites on 12 August. The only evidence adduced at the hearing corroborating Respondent's solicitation of quotes was a plan quote submitted to Respondent by State Mutual Insurance Company dated 23 June. There was no corroboration of Davis' claim regarding the time when the decision was made to offer employees partially paid dependent coverage.

With respect to a promise of dependent insurance coverage by Hege at Tampa, Guthrie testified that a few days prior to the 14 October election in a meeting with employees on the Tampa jobsite the employees were "wanting to know about group insurance for their fami-

lies," and Hege responded that "it was in the process," and "they were seeing what they could do about getting group insurance." It is not entirely clear that Fletcher attended the meeting referred to by Guthrie, and he did not otherwise attribute any specific remarks regarding dependent insurance coverage to Hege. On the other hand he did testify that at meeting of employees with Edell within a couple of weeks of the election, "they," apparently referring to Edell, said they were going to get dependent coverage for the employees. Elsewhere in his testimony Fletcher testified that on one occasion when Edell was on the job and bought dinner for the men the question of dependent coverage was raised by an employee and Edell responded "Well, we're checking on some things and that's one of them." Fletcher could not establish the date of Edell's remark, but testified it was made at the time the Tampa employees were not aware that a representation case petition was filed. It seems reasonable to conclude therefore, that the Tampa employees were also not aware of any union activity effecting them at the time since it is clear that the unit the Union had sought in the representation case had not included employees outside those employed by Respondent in the Atlanta area.[4]

Edell did not testify regarding any statements made concerning dependent insurance coverage. Hege in his testimony acknowledged that the question of dependent insurance coverage came up many times "even before the

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[4] Although the Union did not seek initially to include the Tampa employees in the unit it appears that based upon organizer Lambert's testimony in the representation case Lambert visited the Tampa jobsite on 7 August.

thing came up on a vote." Hege further testified "we gave them the answer, 'It's being worked on.". He was vague about exactly when he first learned that dependent coverage was implemented and said generally that it was before the election and after "notification" of the election.

The absence of any degree of consensus concerning the timing of alleged promises of dependent coverage makes it exceedingly difficult to determine with any accuracy when Hege and Edell referred to the Respondent "working on" the insurance question. It seems reasonable to conclude, and I so conclude, that neither Hege or Edell would have said Respondent was "working" on the matter after the point in time on 12 August when Respondent announced the offer of dependent coverage by distribution of a letter to employees with their paychecks. This conclusion appears consistent with Fletcher's testimony that the employees did not know at the time of Edell's remarks whether a representation petition had been filed. In light of this conclusion, I find the testimony of Guthrie and Fletcher (and that of Hege and Edell for that matter) unreliable to the extent it indicates that Hege and Edell told employees after 12 August that Respondent was "working" on dependent insurance coverage. It is likewise unreliable, I find, in establishing that Hege and Edell made such remarks between the time of Respondent's acquiring knowledge of the union campaign and the time on 12 August when the offer of dependent coverage was made.[5] Accordingly, I am unable to con-

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[5] The record does not reveal exactly when Respondent became aware of the union campaign although it apparently was around the time of Lambert's discharge in late July. Further, it does not show exactly when the union activity started, although it suggests it was contemp-

clude that either Hege or Edell made an unlawful promise of benefit to employees at the Tampa jobsite in order to interfere with employee union activity. Moreover, since it has not been established that the "promises" were made following the filing of the representation petition and within the critical objections period prior to the election, I cannot find that such alleged "promises" constituted objectionable conduct.

The fact remains, however, that Respondent did grant a benefit in the form of partially paid dependent insurance coverage to employees after it was aware of the union activity and the filing of the petition. However, Respondent's actual grant of dependant insurance coverage was not alleged in the complaint as a violation, and while the circumstances of the announcement and grant of its benefit was set forth on the record no amendment of the complaint was urged by the General Counsel. Moreover, in the Charging Party's closing argument Respondent's grant of this benefit was only alluded to as "Suspicious" and no illegality finding urged. The General Counsel's brief also does not attack the granting of the benefit, and Respondent's brief does not argue the issue of the legality of the grant itself. Under these circumstances, I find it unnecessary to make any specific conclusion

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oraneous with Lambert's employment on 24 July. There was thus a period of three weeks at least between the time when both Guthrie and Fletcher were employed on 1 July and the advent of union activity when Edell and Hege could have made the remarks about "working" on the dependent insurance coverage. Such remarks during this period would be entirely consistent with Davis' testimony that during this period Respondent was seeking quotes on the insurance coverage.

regarding the legality of Respondent's grant of partially paid dependent insurance coverage to employees.

C. *The Layoffs*

1. **The Evidence**

It is undisputed that Respondent on 4 September at its Concourse 5 jobsite in the Atlanta area terminated or laid off four employees, Roman Modest, Mitchell Kerr, Robert Harris, and Charles Russell. The complaint alleges that these four were discharged because of their membership in, and activities on behalf of the Union. Respondent's defense is that the layoffs or terminations were based upon economic considerations, and that the selections for layoff were based strictly on seniority.

Respondent's records showed that Modest and Harris were hired on 3 August. Kerr was hired on 31 July, while Russell was hired on 25 August by job superintendent Maynard at Kerr's request, Kerr explaining that he and Harris needed a "riding partner" for their commute to the job from their North Georgia homes. Modest's union background has already been noted. Further, Modest testified that following employment by Respondent he participated in the Union campaign, and gave testimony on behalf of the Union at the 21 August representation case hearing. Kerr was also active for the Union and testified he had been sent by the Union to seek a job with Respondent. In addition, Kerr solicited and obtained a union authorization card from Russell dated 27 August.

Harris had been a union member prior to his employment by Respondent, and following such employment, according to Harris' testimony which was uncontradicted in this regard, he was seen by Maynard posting

union literature on the jobsite. Further, like Kerr, Harris had been sent by the Union to seek employment with Respondent with the instruction that he should be a "role model" employee. He conceded in his testimony that his pay was supplemented by the Union. Finally, Harris also testified for the Union at the representation case hearing.

Kerr's testimony was that on 4 September he was working on the job with Harris when Maynard and Randy Dennis, project manager for Respondent on the Concourse 5 job, the construction of a 34 story building, came up to the floor on which Kerr and Harris were working. Maynard came over and told them that he was going to have to lay them off because "they" found out that the union hall sent Kerr and Harris down there to get a job. Maynard further stated that the matter was out of his hands. Harris protested loudly but Maynard repeated that it was out of his hands. Harris' testimony is generally consistent with that of Kerr. Harris added, however, that he had earlier heard "hints" from Maynard that there would be a layoff.[6]

Kerr further testified that immediately after being advised of the layoff by Maynard he walked over to the

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[6] Maynard had told employees earlier in the morning that a layoff was possible. However, Maynard testified he didn't know at that time which employees would be laid off. Davis explained in his testimony that seniority dates had to be pulled from Respondent's computer and no one previously knew who were the least senior employees in the overall unit including several jobsites. Although Respondent may not have known prior to the computer run precisely all the least senior employees, I am persuaded Respondent, and George Johnson, Sr., in particular, who closely supervised hiring in August, was generally aware of who had been most recently hired.

gang box with Maynard to empty his tool belt. The two discussed the matter further, and Kerr asked Maynard how long he figured they would be laid off. Maynard replied that he would try to get them back to work as soon as he could, but that it would probably be after "this Union business" was over.

Modest's testimony concerning the layoff was simply that Maynard separately told him he had been chosen to be laid off and said the reason was for lack of work. He further testified that he had learned from another contractor's employee the day before that Respondent would be laying off employees. What Russell was told regarding his layoff was not revealed since Russell did not testify. However, Russell, Harris, Modest, and Kerr all received separation notices showing "Lack of Work" as the reason for separation.

It is undisputed that Respondent had a substantial amount of work left to perform on the Concourse 5 job, and that it proceeded to perform work on the job with additional employees transferred from other jobsites. It is likewise undisputed that Respondent had found no fault with the work of the four laid off employees. Indeed, Maynard admitted that Kerr and Harris were probably above average in their work compared with employees retained. On the other hand, it is clear and undisputed that the four alleged discriminatees were in fact the least senior employees on Respondent's work force in the Atlanta area at the time of the layoff. Respondent concedes, however, that it had not followed strict seniority in past layoffs.

Under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), modified 662 F.2d 899 (1st Cir. 1981),

cert. denied 455 U.S. 989 (1982) the General Counsel is required in attempting to establish an 8(a)(3) and (1) violation to "make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision [to terminate an employee]. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct." *Wright Line*, supra, at 1089 (footnote omitted). By showing that the four employees laid off had been engaged in union activity, that Respondent was aware of that involvement as reflected in Maynard's alleged comment to Kerr and Harris that Respondent had learned they had been sent by the Union, that Respondent harbored union animus as revealed in the 8(a)(1) violations found herein, that Maynard stated the layoff selections were based on union concerns (at least with respect to Kerr and Harris and, inferentially, Modest and Russell since it was necessary to lay them off to reach Kerr's seniority level), that Respondent had substantial work left to be done on the Concourse 5 job at the time of the layoffs, and that Respondent had not followed strict seniority in past layoffs, the General Counsel, I conclude, has established the required prima facie case that the layoff selections were based on union considerations in violation of Section 8(a)(3) and (1) of the Act. The burden therefore shifts to Respondent demonstrate establish that the layoffs would have taken place, and the layoff selections would have been the same, even in the absence of union activity generally or the specific activities of those selected for layoff.

The Respondent justifies the layoff based on economic reasons as related in the testimony of comptroller

Davis. Thus, Davis testified that in early September work was winding down on Respondent's IBM Tower job, and during a regular project manager's meeting on 1 September the IBM Tower job superintendent Tony Faulkner advised Johnson, that he could no longer keep five of his men busy. It was, according to Davis, common practice to shift employees from one location to another. Thus, other job superintendents were queried whether they could use extra men. None could. Accordingly, Johnson made the decision to layoff five men, and while Respondent concedes that it had not followed strict seniority in past layoffs, Johnson after consulting with his counsel decided the layoff should follow strict seniority. Davis by examining Respondent's records prepared a list of Respondent's least senior employees on 3 September. Johnson chose the four alleged discriminatees and one other individual. The separations were thereafter effected on 4 September although it was discovered that the fifth individual set for layoff, M. A. Johnson who worked on the IBM job and had a seniority date of 12 August, had already quit.

2. **Arguments and Conclusions**

Davis' testimony regarding the necessity for a layoff was not contradicted. Further, a compilation of hours worked by Respondent's Atlanta employees prepared by Davis confirms that the total employee hours expended on the IBM job began winding down in late June, and while the total hours varied somewhat from week to week, a substantial drop in excess of 200 man hours took place between the week ending 4 September and 11 September. Thereafter, the total hours continued to decrease until the job was completely finished in late De-

cember. There was a similar decrease in total hours in Respondent's other work sites over the same period except for the Concourse 5 site which showed only a 17 man hour drop between 4 and 11 September and an increase of from 120 to over 200 man hours in the following weeks. Based upon Davis' uncontradicted and otherwise credible testimony and the unrebutted figures regarding the overall decrease in hours on all jobs I must conclude the evidence is sufficient to establish that the decision to implement a layoff was warranted. Accordingly, I find that the decision to implement a layoff was not unlawful.

There remains the issue of whether the selections for layoff were discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act as the General Counsel and Charging Party argue. The resolution of at least one aspect of this issue rests upon whether Kerr and Harris are credited over Maynard and Dennis. Having evaluated the demeanor and testimony of these four witnesses considered in the context of the record as a whole I credit the former two over the latter. Both Kerr and Harris impressed me as sincere and candid witnesses making an honest attempt to factually and accurately relate what had transpired at the time of their layoffs. Moreover, while Maynard and Dennis denied that Maynard told either Kerr or Harris that Respondent had found that the Union had sent them down to get the jobs, both Maynard and Dennis failed to contradict Kerr's testimony at the gang box that Maynard said that their recall from layoff would probably be after "this Union business" was over. This undenied remark clearly reveals that union considerations were a factor in the layoff selections and tends to support the testimony of Kerr and Harris

regarding what they were told was the basis for their layoff selection. I also noted in this regard that while Dennis claimed in his testimony that it was Harris who made the statement to Maynard and Dennis that he was being laid off because of their relationship to the Union, Dennis made no claim that either he or Maynard specifically disavowed Harris' assertion.

Crediting Kerr and Harris, and noting Respondent's concession that it had not strictly followed seniority in prior layoffs, I must conclude that Respondent has failed to demonstrate in the face of the General Counsel's prima facie case that Respondent would have selected the alleged discriminatees for layoff even in the absence of their union involvement.[7] I find therefore that Respondent violated Section 8(a)(3) and (1) of the Act as alleged.[8]

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[7] While there was no evidence that Respondent was specifically aware of Russell's union sympathies or that he had signed a union authorization card, it could reasonably conclude that he was a likely union supporter by virtue of his employment at the request of Kerr, a known union "plant," and his riding to work with Kerr and Harris. In any event, even if Respondent was not aware of Russell's union inclinations, he was nevertheless the object of unlawful discrimination. It is well settled that an employer's discharge of uncommitted or neutral employees during a union campaign in order to "cover" or facilitate discriminatory conduct against "targeted" union employees is violative of Section 8(a)(1) and (3) of the Act. See *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984).

[8] The fact that Respondent attempted to recall the discriminatees in December, and did recall Kerr, does not detract from this conclusion. Since the complaint herein had already issued at the time of the claimed recall efforts, it is not clear that such efforts were not responsive only to the complaint rather than demonstrating the absence of any discrimination in the initial layoffs.

Even if I were to credit the testimony of Maynard and Harris that Kerr and Harris were not told that they were selected for layoff because Respondent found they had been sent to the job by the Union, I would still find their layoffs unlawful. This is because Respondent in using seniority as the sole criteria for the layoffs here was not being consistent with its past practice in making layoff selections. In the past seniority had only been one of a number of factors considered in selecting individuals for layoffs. Moreover, the change to a strict seniority system in the case sub judice was, based on Davis' testimony, specifically responsive to the union campaign among Respondent's employees. Thus, while Respondent has shown that it's past practice was also to shift employees between jobsites to avoid layoffs, there was no evidence submitted that it would have specifically selected the four discriminatees for layoff here if seniority had not been the sole criteria utilized for their layoff selection. Respondent asserts that seniority was selected as the fairest and most objective standard to use in the layoffs here, and less likely to raise objections from the Union than the more subjective standards previously used. Thus, Respondent argues it was compelled to select employees for layoff by seniority. It also argues that the Board's decision in *Jones Ceilings, Inc.*, 263 NLRB 469 (1982) supports its position here. In *Jones Ceilings* the employer in the face of a union election petition selected one of its three truck drivers for layoff on the basis of seniority after consulting with its attorney. The Board found the layoff to be justified and the basis for layoff selection was not pretextual or unlawful. In reaching this conclusion the Board found other evidence in the case insufficient to show a connection between the layoff selection and the union activity.

Jones Ceilings and other cases cited in Respondent's brief[9] in which seniority was found to be a nondiscriminatory basis for layoff, are distinguishable from the instant case for unlike here the cited cases do not appear to have involved a clear departure from prior practice.

Accordingly, it must be concluded, and I so conclude, that the layoffs were a direct consequence of a change in the basis for layoff selection which change was a direct response to union activity. The four were for this further reason, and in the absence of evidence that they would otherwise have been selected for layoff, the objects of discrimination which tended to discourage membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

III. The Objections to the Elections

Objection 1

The Union's Objection number 1 to the election complains of the discriminatory layoffs of Harris, Kerr, Modest, and Russell on 4 September. Having found above that such layoffs were in fact discriminatory I find that this objection has merit and shall recommend that it be sustained.

Objection 3

In this objection the Union asserted that Respondent granted additional insurance coverage to employees during the pendenancy of the representation petition. As

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[9] *Dawson Carbide Industries*, supra; *A.J. Schmidt Co.*, 269 NLRB 579 (1984); *Femco Machine Company*, 238 NLRB 816 (1978); *Triangle Sheet Metal Works, Inc.*, 238 NLRB 517 (1978); *Alberts, Inc.*, 213 NLRB 686 (1974).

already noted the complaint does not allege an unlawful grant of a benefit in the form of additional insurance coverage, only an unlawful promise of such. The evidence regarding Respondent's grant to employees the option for dependent insurance coverage has, however, already been discussed. Based on Davis' testimony, uncontradicted in this regard and which I find credible, it is clear that Respondent was in fact "working on" dependent insurance coverage for employees prior to the advent of the union campaign. It is clear and well settled that an employer faced with a union campaign among its employees must proceed in the same manner as it would have done had the Union not been conducting its campaign. See e.g. *Russell Stover Candies, Inc.*, 221 NLRB 441 (1975); *Gerbes Super Market, Inc.*, 213 NLRB 803, 810 (1974). Since I find credible Davis' testimony also that Respondent had already decided to offer employees dependent coverage prior to the Union campaign and that such offer was delayed only because of the search for the lowest possible rates, I conclude that Respondent in offering dependent insurance coverage to employees on 12 August was simply effectuating a decision already made. I therefore find the offer was not designed to interfere with the election and did not have that effect. I shall recommend that this objection be overruled.

Objection 6

The Union's Objection 6 asserts that Respondent promised permanent employment to employees if they would reject the Union as their exclusive bargaining representative. This claim is not coextensive with any allegation of the complaint, and no independent evidence was adduced by the Charging Party to substantiate it. Ac-

cordingly, no merit is found to this objection and it will be recommended that it be overruled.

Objection 7

Objection 7 states that Respondent threatened to start another company to operate nonunion if the employees voted for representation. This contention appears to be coextensive with the complaint allegation that Respondent would close its "plant" if the employees engaged in Union activities, and is supported by the credited testimony of Fletcher regarding statements of Edell already discussed above to the effect Respondent would close, move, or change its name if employees organized. I found such remark to constitute an unlawful threat violative of Section 8(a)(1). Conduct which violates Section 8(a)(1) is *a fortiori* conduct which interferes with an election. *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1786 (1962). I therefore find merit to this objection and shall recommend that it be sustained.

Objection 8

The Union contends in this objection that Respondent threatened employees with discharge and loss of jobs if the Union were designated the collective-bargaining representative. The objection appears to be coextensive with the complaint allegation concerning remarks attributed to Edell by Guthrie and Fletcher previously discussed. I found such remarks by Edell alluding to loss of work to the Iron Workers as a result of organization by the Union constituted an unlawful threat violative of Section 8(a)(1). I likewise find it to constitute objectionable conduct occurring within the critical period.

Accordingly, merit is found to this objection and I shall recommend that it be sustained.

Objection 9

The Union's Objection 9 is a "catch all" objection referring only to "other acts and conduct" of the Respondent and outlines no specific actions on the Respondent's part. No independent evidence was adduced in support of this objection concurring within the critical period between the filing of the petition and the holding of the election. Accordingly, no merit is found to this objection and it will be recommended that it be overruled.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating an employee regarding his Union membership or activities; by threatening to close, move or change its name if its employees selected the Union to represent them, and by threatening its employees with the loss of jobs if they selected the Union to represent them, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a) (1) of the Act.

4. By discriminatorily laying off Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris on 4 September 1987, because of their union activities and involvement, Respondent engaged in, and is engaging in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The unfair labor practices set forth in paragraphs 3 and 4 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Union's Objections Nos. 1, 7, and 8, have merit and must be sustained, while Objections Nos. 3, 6, and 9 are without merit and must be overruled.

7. Except as found in paragraphs 3 and 4 above, the General Counsel has failed to establish by a preponderance of evidence that Respondent violated the Act in any other manner alleged in the complaint.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

Having further found that Respondent discriminatorily laid off its employees Roman Modest, Mitchell Kerr, Charles Russell and Robert Harris because of their union activities, it will be recommended that Respondent be ordered to reinstate them to the positions they held prior to their layoffs, or, if those positions no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings and benefits suffered by them as a result of their discriminatory layoffs. Backpay is to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB No. 181 (28

May 1987).[10] Any dispute as to when any of the discriminatees returned to work or whether Respondent made a valid offer to return them to work can best be resolved at the compliance stage of this case.

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended:

ORDER[11]

Respondent, Jamco (Johnson Architectural Metal Company), Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees regarding their membership or activities on behalf of Glaziers, Architectural, Metal & Glass Workers Local Union 1940, or any other labor organization.

(b) Threatening its employees that it will close its facility move or change its name if they select the above-named or any other labor organization to represent them.

(c) Threatening its employees that they will lose their jobs if they select the above-named or any other labor organization to represent them.

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[10] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 6621.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Discriminatorily selecting employees for layoff or otherwise discriminating against employees in order to discourage their activities on behalf of the above-named or any other labor organization.

(e) In any like or related manner interfering with, restraining or coercing employees, in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris immediate and full reinstatement to jobs occupied by them prior to any discrimination against them, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in "The Remedy" section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Atlanta, Georgia, and all jobsites where it is currently doing business and employing employees in the unit described in Case 10-RC-13540,

copies of the attached notice marked "Appendix."[12] Copies of the notice on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director of Region 10 of the Board in writing 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the Union's Objections 1, 7, and 8 be sustained, that Objections 3, 6, and 9 be overruled, that the election conducted on 14 October 1987 be set aside, and that case 10-RC-13540 be severed from Case 10-CA-22910 and remanded to the Regional Director for Region 10 to conduct a new election when the Regional Director deems it appropriate.

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[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated at Washington, D.C. 4 April 1988

/s/ _____

Hutton S. Brandon
Administrative Law Judge

"APPENDIX"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees regarding their membership in, or activities on behalf of Glaziers, Architectural, Metal & Glass Workers Local Union 1940, or any other labor organization.

WE WILL NOT threaten to close, move, or change our name if employees select the above-named or any other labor organization to represent them.

WE WILL NOT threaten employees with a loss of jobs if they select the above-named or any other labor organization to represent them.

WE WILL NOT discriminatorily select our employees for layoff or otherwise discriminate against them because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris immediate and full reinstatement to their former jobs, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and WE WILL make them whole for any loss of pay they suffered as a result of the discrimination against them.

JAMCO (JOHNSON
ARCHITECTURAL METAL COMPANY)

Employer

Dated: _____ By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 101 Marietta Tower, 101 Marietta St., N.W., Suite 2400, Atlanta, Georgia 30323. Telephone: (404) 331-2886.

RECORD EXCERPTS
February 10-11, 1988

Record, *Johnson Architectural Metal Company (JAMCO) and Glaziers, Architectural, Metal and Glass Workers, Local 1940*, Case Nos. 10-CA-22910; 10-RC-13540, pp. 356-58 (testimony of Ray Maynard).

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Q: Well, who did you talk to? Who are the four employees?

A: Mitch, Bo, Roman, and Chuck, I believe it was.

Q: Okay. Did you have anybody with you?

A: Yes. Randy Dennis was present.

Q: Randy Dennis. Would you tell the conversation that you had with — concerning the conversation with Randy Dennis and Bo. Just tell what happened?

A: Okay. We had a layoff based strictly on seniority. These guys had the less seniority. We had men coming from another job that were to replace them. And I was instructed to lay them off based on seniority. And that's what I did.

Q: Did you talk to Bo and Mitch —

A: I talked to Bo and Mitch. They were working on a floor. I came up to them. And I'd had a meeting previously to explain that morning what was going on, so there wouldn't be any surprises.

And as I walked up on the floor, Bo — "Oh, no, it's me." And I don't know if you've seen Bo or not, but you know how Bo is.

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I explained to them that they had less seniority and I was going to have to lay them off. And I'd hire them back as soon as we picked back up. What I could do for them.

And, you know, he got a little upset. So did Mitch. They exchanged a few words with me. And I instructed them to get their tools and go on. There wasn't anything they could do. And I gave them my number and stuff. They could call me. And that was about it.

Q: That morning, you didn't know who the less senior employees were going to be, is that right?

A: No, I didn't. No, I didn't. I knew that these fellows were the last ones that I'd hired. But as far as company wide, I really didn't know.

Q: Did you ever say that it had anything to do with union activity, when you were talking to Bo or Mitch?

A: I have never said anything about union activity, as far as they go.

Q: Okay. Did you follow the same course of action in the other two employees?

A: Well, yeah, Chuck, too. And Roman had left early that day. And when he returned, I told him the same thing. It was a layoff. And seniority. And lack

of work.

Q: Was Randy Dennis with you at all times? When you were talking to Bo Harris?

A: Yes, he was.

Q: Close enough to hear?

A: Sure was. Through the entire time until they left the job.

Record, *Johnson Architectural Metal Company (JAMCO) and Glaziers, Architectural, Metal and Glass Workers, Local 1940,* Case Nos. 10-CA-22910; 10-RC-13540, pp. 376-78 (testimony of Randy Gene Dennis).

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Q: Concourse Five. Did you have occasion to accompany Mr. Ray Maynard on September the 4th when he notified some employees concerning a layoff?

A: Yes, I did.

Q: Would you just — were you close enough to hear all of his conversation?

A: Yes, I was.

Q: Would you state what he said? Particularly first with the ones of Mitchell — I can't recall them.

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Q. Who were the two employees together?

A: It was Mitch or Gary, and Bo Harris.

Q: Okay. Would you just state what was said to Bo Harris? And Mitch was at the same locality?

A: Yes. They were working together side by side.

Q: Would you tell what happened? What was stated?

A: We walked up on the floor. And they were together. And Ray came up to them and told them that they were being laid off because we had people coming from IBM over to take their place because of the low seniority that they held.

About that time, Bo just starts putting his hands up in the air and that. And Gary kind of walked away. And, you know, Bo was just up — he was totally upset with the situation.

Then we walked down to the gang box. And they put the tools that they were using up. And at that time, Mitch asked Ray — he wanted to talk to somebody. And he gave Doug Davis' name and the office number.

And when they left, everybody shook hands. And told them if we possibly could bring them back, that we would.

Q: Did you hear Ray Maynard saying anything at

all about union activity during that conversation?

A: No, sir.

Q: Were you close enough to have heard it if he said it?

A: Yes, I was. If any — you know, Bo was the one that was saying, you know, about the union and that. And that he said that's why he was being laid off. But that wasn't anything what we said.

Record, *Johnson Architectural Metal Company (JAMCO) and Glaziers, Architectural, Metal and Glass Workers, Local 1940*, Case Nos. 10-CA-22910; 10-RC-13540, pp. 256-57 (testimony of David Edell).

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Q: Can you recall a discussion about PPG?

A: Oh, yes. Most of our management, including

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myself and our employees at the job, had worked with PPG at one time. I'd say half of our field crew there had worked with PPG. And PPG in most areas are union.

And they had announced that they were closing all of their branches at the end of the year, end of '87. And we discussed that because it was some interest to our employees.

Record, *Johnson Architectural Metal Company (JAMCO) and Glaziers, Architectural, Metal and Glass Workers, Local 1940*, Case Nos. 10-CA-22910; 10-RC-13540, pp. 281-82 (testimony of Albert Bell).

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JUDGE BRANDON: . . . Did Mr. Edell say at that meeting that the Employer, JAMCO, would not negotiate with the union?

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THE WITNESS: No, sir. I think if he had said that, A.J. Hege, which is the supervisor —

JUDGE BRANDON: Well, I don't need to know a guess.

THE WITNESS: No, sir. He did not say that. No sir.

JUDGE BRANDON: All right. Did he say that JAMCO would not sign a contract with the union?

THE WITNESS: No sir. He did not say that.

JUDGE BRANDON: Did he say anything like either one of those things?

THE WITNESS: No, sir. He did not.

Record, *Johnson Architectural Metal Company (JAMCO) and Glaziers, Architectural, Metal and Glass Workers, Local 1940,* Case Nos. 10-CA-22910; 10-RC-13540, pp. 298-99 (testimony of Albert Bell).

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Q: Okay. Who brought up the question of the company going out of business and opening up under a different name?

A: Opening up under a different name?

Q: Yeah. And with a new crew of employees.

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A: To the best of my knowledge, that — that question never came up.

Q: You don't recall that question coming up?

A: The question never came up. If it came up, myself and A.J. Hege would — has been around unions for thirty years.

And myself, .who's been involved in the union negotiations. I think a red flag would automatically gone up. And we probably would have pulled Mr. Edell aside and told him he couldn't say that. Because that would have been circumventing the union.

So if that question had have came up, I think we both — I would have remembered that question. That never came up.

Record, *Johnson Architectural Metal Company (JAMCO) and Glaziers, Architectural, Metal and Glass Workers, Local 1940*, Case Nos. 10-CA-22910; 10-RC-13540, pp. 310-11 (testimony of Aaron J. Hege).

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Q: Tampa, Florida. Do you recall a meeting approximately two days prior to the election in which Mr. David Edell had a question and answer period with the employees on the job site?

A: I do, yes.

Q: Were you at that meeting?

A: I was, yes.

Q: Would you just tell the Court, the Judge, what happened?

A: Well, we stood around there and had a talk with the boys and asked them if there was any questions they would like to ask of JAMCO.

We discussed about PPG's closing the doors at the end of the year, 1987. They were closing down their operations in the area.

And, of course, I'm a former employee of PPG,

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and I was interested in it because — to know what the company would — would happen to the company.

And there's other things that came up. You know, what — someone said, "Well, what's JAMCO going to do?" "Well, we're going to stay in business."

And talked about what our project was — or what we were — our projection was to stay in business. We're going to try and satisfy the employees, and keep the relationship with the employees.

And they went on and asked a few questions. I don't recall of all the questions that was asked. But we tried to ask them and answer them in a manner that would be satisfactory.

And I guess went on to say that JAMCO would negotiate with the union if that's the way they felt like they wanted to go.

And I don't know of anything else that was directed as saying that JAMCO would not negotiate with the union, because there was nothing said about that to my knowledge.

Record, *Johnson Architectural Metal Company (JAMCO) and Glaziers, Architectural, Metal and Glass Workers, Local 1940*, Case Nos. 10-CA-22910; 10-RC-13540, pp. 95-96 (testimony of James Donald Fletcher).

Q: Excuse me. I'm trying to just understand a little bit of the way this thing went. Mr. Edell says, "Look, they only have one glazier — glazing company signed up on a contract in Atlanta." I mean, and everybody assumed that was PPG.

A: No. He made that statement.

Q: Okay. PPG was signed up. That's true.

A: Yes, sir.

Q: And that was accurate.

A: Also, as far as the closing's concerned, PPG — the Orlando branch, as far as I know, didn't close. But PPG, the contracting division was up for sale. All of the contracting divisions were up for sale, which would be — Atlanta had a contracting division, and Orlando had a contracting division. And they were up for sale.

Q: All right.

A: To a buyer. They were either going to sell the whole unit, or sell each one of them as a different

unit, the contracting division. And they had made the statement that there was no buyer for the one in Atlanta, that they would close the doors.

Q: All right. And the closing time that you referred to was in conjunction with PPG's situation, is that right?

A: True.

Supreme Court, U.S.
FILED
JUL 29 1991
OFFICE OF THE CLERK

(2)

No. 90-1821

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMCO (JOHNSON ARCHITECTURAL METAL CO.),
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that petitioner threatened reprisals against employees if they chose to elect a union and retaliated against employees for their union activities.

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v.

NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported, but the decision is noted at 927 F.2d 614 (Table). The decision and order of the National Labor Relations Board (Pet. App. 2a-10a), adopting, with modifications, the decision and proposed order of the Administrative Law Judge (Pet. App. 11a-52a), are reported at 294 N.L.R.B. No. 80.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1991. The petition for a writ of certiorari was filed on May 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a construction contractor specializing in glass and metalwork, works on construction projects in Georgia, Florida, and other southern states. Pet. App. 13a-14a. In July 1978, the Glaziers' Architectural, Metal, and Glass Workers' Local 1940 ("the Union") began an organizational campaign among petitioner's employees. Employee Johnnie Lambert obtained signed union authorization cards from a number of employees at petitioner's IBM Tower jobsite in Atlanta, Georgia. *Id.* at 14a. After learning of Lambert's union activities from another employee, job superintendent Tony Faulkner questioned Lambert about his union membership and told him that petitioner was "not union" and either "didn't want" a union or was "not going" union. *Id.* at 17a.

Between July 31 and August 25, petitioner hired four new employees—Mitchell Kerr, Roman Modest, Robert Harris and Charles Russell—to work at a jobsite known as Concourse 5 in Atlanta. Pet. App. 34a. During the month of August, all four men engaged in union-related activity while employed at the job site.[1] On approximately September 1, IBM Tower Superintendent Faulkner advised General Superintendent Johnson that he no longer had work for five employees. Petitioner routinely shifts employees among various job sites. Johnson accordingly asked other job superintendents if they could use additional employees at

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[1] Harris, a union member, had been sent to the jobsite by his business agent and was told to be "a role model employee." Kerr, a union member when hired, solicited authorization card signatures from other employees. Modest and Harris testified for the Union at a Board-conducted hearing on the Union's representation petition held on August 21. Harris was also observed posting union literature by Project Superintendent Maynard. On August 27, two days after being hired, Russell signed a union card. Pet. App. 34a-35a.

their job sites. Since no workers were needed on other projects, Johnson decided to lay off five men. *Id.* at 37a-38a. In a previous layoff during the summer of 1986, petitioner had chosen employees to lay off based on a combination of factors, including the employees' skill, experience, and length of service. *Id.* at 36a, 38a; Tr. 189-191, 352-353, 388-389.[2] This time, however, petitioner opted to lay off employees strictly according to seniority, Pet. App. 38a, 41a; Tr. 188-191, 372-373, which resulted in the layoff of employees Modest, Kerr, Harris, and Russell at the Concourse 5 site, and another employee working elsewhere. Pet. App. 34a, 38a. Because there was a substantial amount of work left to be done on the Concourse 5 job, other employees were transferred to Concourse 5 to perform the work of the laid off employees. *Id.* at 36a.

According to employees' testimony, Superintendent Maynard approached Kerr and Harris at the jobsite on September 4 and informed them that they were being laid off because petitioner had "found out that the Union hall sent [them] down there to get a job." Maynard stated that the matter was "out of his hands." Harris objected, but Maynard reiterated that it was not within his control. Maynard told Kerr that "he would try to get them back to work as soon as he could, but it would probably be after 'this union business' was over." Pet. App. 35a-36a.

About one week before the October 14 representation election, David Edell, the project manager at petitioner's jobsite in Tampa, Florida, spoke to an assembly of the Tampa employees. Tampa jobsite employees Guthrie and Fletcher claimed that Edell made threats that petitioner's operation would be closed if the Union won the election. Pet. App. 23a-24a, 27a, 29a. The Union lost the ensuing election and filed objections to petitioner's preelection con-

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[2] "Tr." refers to the transcript of the hearing before the ALJ.

duct and unfair labor practice charges with the Board. *Id.* at 12a.

2. In a decision that was affirmed by the Board, as modified (Pet. App. 2a-3a), the administrative law judge (ALJ) found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening to close or move if the employees selected the Union to represent them. Pet. App. 29a. The ALJ further found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by laying off employees Roman Modest, Mitchell Kerr, Charles Russell, and Robert Harris because of their union activities. Although the ALJ found that the employer was within its rights in implementing a layoff, he determined that petitioner's decision to lay off workers according to strict seniority was motivated by anti-union animus.[3] Pet. App. 38a-42a. The ALJ noted that petitioner "had a substantial amount of work left to perform on the Concourse 5 job" and that petitioner conceded that "it had not followed strict seniority in past layoffs." *Id.* at 36a. The ALJ also relied on the testimony of employees Kerr and Harris that Maynard attributed the employees' layoffs to their involvement with the union. *Id.* at 39a-40a.

In finding that Tampa project manager Edell made threats that petitioner would shut down or move if the union campaign succeeded, the ALJ expressly credited the testimony of employee James Fletcher. Pet. App. 27a. The ALJ noted

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[3] The Board also affirmed the ALJ's finding, which petitioner does not challenge here, that petitioner violated Section 8(a)(1) by coercively interrogating employee Lambert regarding his union activities. Pet. App. 18a. In addition, the Board determined that the representation election should be set aside because it was tainted by petitioner's unlawful conduct. *Id.* at 6a, 42a-45a. The Board's direction of a second election (*id.* at 7a-8a) was not before the court of appeals for review, and petitioner does not challenge it before this Court.

that Fletcher was still employed by petitioner and was putting his job at risk in testifying against petitioner. *Id.* at 26a. The ALJ also found that Fletcher's demeanor reflected an "attempt[] to testify honestly and accurately." *Ibid.* The ALJ added that Fletcher's "believable testimony" was "enhanced by Edell's admitted references [during the talk to Tampa employees] to the closing of PPG [Pittsburgh Plate Glass], another union contractor." *Id.* at 27a. The ALJ also relied on the absence of "specific denials by [petitioner's] witnesses" concerning Fletcher's testimony. *Ibid.*[4]

3. The court of appeals enforced the Board's decision in an unpublished *per curiam* decision. Explaining that "[q]uestions of credibility are peculiarly within the purview of the fact finder," Pet. App. 1a, the court found that the Board's decision was supported by substantial evidence in the record.

ARGUMENT

1. Petitioner asserts (Pet. 9-10, 13-14) that the Board has attempted to "sustain [a] holding * * * not warranted by law"—that petitioner was not entitled to lay off employees by seniority—by purporting to rest its decision on "unsupported credibility choices." There is no merit to that contention. The issue here is not whether petitioner, in the absence of anti-union considerations, may lay off employees based on seniority, but whether anti-union considerations in fact motivated petitioner's decision. As peti-

[4] In adopting the ALJ's findings on this point, the Board found it "unnecessary to rely on the judge's statement[] that there were no specific denials by [petitioner's] witnesses of employee Fletcher's testimony" concerning Edell's remarks. Rather, the Board found sufficient to support the decision the ALJ's other observations concerning Fletcher's credibility and the corroboration provided by Edell's admitted references to plant closings at PPG. Pet. App. 3a n.2.

tioner acknowledges, an employer's selection of employees for layoff based on seniority is impermissible where use of seniority is "a change in policy evidently motivated by anti-union animus." Pet. 12. Here, the Board found that, in choosing to follow strict seniority to effect the layoffs of Modest, Kerr, Russell and Harris, petitioner made a change in policy that was motivated by hostility to the Union. The Board's fact-bound determination raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[5]

2. Petitioner's challenge (Pet. 14-17) to the Board's finding that Tampa project manager Edell made threats that petitioner would shut down if the Union was elected also presents nothing more than an evidentiary issue. Petitioner contends (Pet. 15) that the Board improperly upheld the ALJ's resolution of this issue because the ALJ erroneously found (Pet. App. 27a) that no employer witness specifically denied the remarks Fletcher attributed to Edell. As we have already noted, however, see p. 5 note 4, *supra*, the Board did not rely on this aspect of the ALJ's decision (*id.* at 2a-3a n.2). The Board affirmed the decision by relying exclusively on other evidence supporting the ALJ's conclusions: the ALJ's findings concerning Fletcher's demeanor, the fact that Fletcher's statement was against self-interest, and Edell's admitted reference to the closing of a unionized

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[5] Petitioner's assertion (Pet. 11-12) that its use of seniority was not a change in policy simply takes issue with the ALJ's contrary finding based on petitioner's own admissions. Pet. App. 36a, 41a. Petitioner's objection (Pet. 13) to the ALJ's reliance on his erroneous finding that petitioner's witnesses failed to deny "conciliatory remarks allegedly made by [petitioner's] supervisors while distributing the layoff notices" ignores that the Board expressly discounted that reliance in upholding the conclusion that the employer's layoff decision was motivated by anti-union considerations. See Pet. App. 2a-3a n.2.

competitor. *Id.* at 26a-27a; Tr. 252, 256-259.[6] These findings provide ample record support for the Board's factual determination that Edell made improper threats to petitioner's employees.[7]

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[6] The record fails to support petitioner's contention (Pet. 15-16) that Fletcher contradicted his own testimony. In the excerpt set out by petitioner (Pet. App. 61a), Fletcher, on cross-examination, answered "yes" to an inquiry as to whether "the closing time that [he] referred to was in conjunction with PPG's situation." On direct, however, Fletcher made clear that Edell discussed the closing of PPG in the context of petitioner's threat to close. See Tr. 85-86, 68-69.

[7] The cases cited by petitioner (Pet. 16-17) are not to the contrary. In *Ona Corp.* v. *NLRB*, 729 F.2d 713, 721-722 (11th Cir. 1984), the court rejected findings that were based entirely on the testimony of a witness that the ALJ himself found had made numerous "misrepresentations," possessed an "extremely unfavorable demeanor," and was hostile and untruthful. In *Custom Recovery, Division of Keystone Resources* v. *NLRB*, 597 F.2d 1041 (5th Cir. 1979), the ALJ, in deciding to credit one witness over another, relied on a nonexistent contradiction in the testimony of the discounted witness, and disregarded his own determination that the witness he believed was unreliable. In *NLRB* v. *Florida Citrus Canners Cooperative*, 311 F.2d 541, 543-544 (5th Cir. 1963), the court reaffirmed its earlier decision (288 F.2d 630, 636-638) that the ALJ's credibility resolutions were based on an improper and unwarranted assumption concerning the loyalties of an employee that had "left the union and went with the management." 311 F.2d at 543.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
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JULY 1991

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